

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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State of Oklahoma, et al.,	)	
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	)	
	)	05-CV-0329 GKF-SAJ
Plaintiffs,	)	
v.	)	
	)	
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

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**DEFENDANTS' REPLY TO JOINT MOTION TO ENFORCE SCHEDULING ORDERS**  
**IN LIGHT OF PLAINTIFFS' EXPERT DISCLOSURE ABUSES**

Defendants urge the Court to enforce its Scheduling Orders and to grant them relief from the prejudice imposed by Plaintiffs' continued failure to adhere to the Court's expert deadlines. Since Defendants filed their motion, Plaintiffs have served five more errata from their experts Wells, Stevenson, Fisher, Olsen, and Cooke. Like many of the other errata, these include substantial revisions of analyses and opinions and rely on significantly changed data.

As discussed below and in the accompanying Declarations of Dr. Vic Bierman (Ex. A) and Dr. Tim Sullivan (Ex. B), Plaintiffs' repeated claims that their errata "do not contain new opinions and do not rely upon new data" (e.g., Dkt. No. 1766 at 21, 16) are simply mistaken. Further, many of the errata involve subjects critical to the evaluation of Plaintiffs' overall scientific case, and many changes are substantial. (Ex. B ¶¶ 9-10.) Defendants' experts cannot uncritically accept Plaintiffs' experts' assertions that their changes are negligible and that the ultimate conclusions remain the same despite the changes in underlying analysis and data. Due diligence requires that Defendants' experts reexamine Plaintiffs' experts' supporting data and analyses, old and new, both to verify the nature and extent of the changes and to test the impact of those changes on the conclusions of all of Plaintiffs' experts. (Ex. A: ¶¶ 5-6; Ex. B ¶¶ 6-8.)

#### **A. Plaintiffs' Five New Expert Errata.**

Since Defendants filed the present motion, Plaintiffs have served five more new errata to their expert reports from Drs. Fisher, Wells, Stevenson, Olsen, and Cooke. (See Exhibit C, a chart that details the nature and timing of all the substantive expert errata.) The last four errata were served late on September 30, only 15 days before Defendants' first expert report deadline, and Plaintiffs still have not provided all of the new materials supporting them.<sup>1</sup> (Ex. K.) Despite

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<sup>1</sup> Plaintiffs' attorney's September 30, 2008 cover letter notes that Wells' second errata was completed on September 22, Olsen's second errata on the 24th, and both Cook's and Stevenson's second errata on the 26th. (Ex. D.) Plaintiffs have not explained the delays in production.

this, Plaintiffs will not accede to any additional time for Defendants' experts to consider these errata before filing their reports, or to reopen any of Plaintiffs' experts' depositions (except for Todd King, discussed below). (Dkt. No. 1766 at 22-23.)

**Dr. Berton Fisher.** On September 18, Plaintiffs served a second errata from Dr. Fisher, their expert on poultry waste disposal and the fate and transport of land-applied litter. As noted in the Motion, during the second day of Fisher's deposition, Fisher produced a first errata that rewrote a key conclusion comparing the chemical composition of poultry waste to that of cattle waste and waste water treatment plant effluent, altering his results by factors of up to 10,000. (Dkt. Nos. 1759 at 13 & 1759-10.) Fisher admits that his first errata changes were extensive:

Q Can you identify for me the changes that were made?

A Well, there are several. I pretty much would change all of the – I can identify – **how long do you want to take to identify them? All day?**  
I mean, **pretty much all the numbers that relate zinc, copper and arsenic to phosphorus have changed ...**

(Ex. E: Fisher 9/4/08 Dep. at 405:5-11, emphasis added.) Plaintiffs nevertheless assert that none of their errata "rely upon new data." (Dkt. No. 1766 at 21.)

Despite considerable discussion of the first errata at this deposition, neither Fisher nor Plaintiffs' counsel mentioned any intention to serve a second errata. (Ex. E at 401:25–423:1.) Yet two weeks later, on September 18, Plaintiffs served a second errata for Dr. Fisher, which Plaintiffs describe as merely changing litter weights from dry to wet. (Dkt. No. 1766 at 9.) In fact, Fisher's 33-page second does far more than that, and significantly modifies his Total Phosphorus (P), Total Zinc (Zn), Total Copper (Cu), and Total Arsenic (As) ratios in conclusion 18 due to his admitted use of "wrong data" for Total P. (Ex. F: Fisher Second Errata.) In the second errata, the ratios for Total Zn/Total P, Total Cu/Total P, Total As/Total P, and Total Zn/Total Cu for poultry waste, cattle waste, and WWTP effluent increased by up to 47,043 times

from the original report, up from a first errata increase of up to 30,129 times.

Notwithstanding Plaintiffs' and Fisher's own assertions that his opinions are unchanged, the ratio changes in his two errata modify Fisher's conclusions about the relative abundance of these compounds in poultry waste, cattle waste, and WWTP effluent. Dr. Fisher originally stated that Cu (with respect to P) was more than 151,000 times more abundant in poultry waste than in WWTP effluent; in his first errata that Cu was actually only 2.8 times more abundant; and now in his second errata that Cu is 6.7 times more abundant. Similarly, Fisher originally claimed that arsenic (with respect to P) was 13,400 times more abundant in poultry waste than in WWTP effluent; then changed the ratio to 4.9 in the first errata; and then to 6 times in the second errata. His second errata also rescinds his first errata conclusion that Zn (as to Cu) is more abundant in cattle waste than poultry waste. Notably, in direct contradiction to a conclusion in his original report, Fisher now opines that arsenic (as to P) and that zinc (as to both P and Cu) and are all less abundant in poultry waste than in WWTP effluent.

Dr. Fisher's revisions to his revisions have resulted in both fundamental and confusing changes, all made either during or after his deposition. As a result of these changes, Defendants' experts have had to essentially scrap not only the work performed based on the original Fisher report, but also the work done in the meantime based on the first Fisher errata. (Ex. B: Sullivan Decl. ¶¶ 13-14.) Defendants' experts are also working to gauge the broader impact of Fisher's dry- to wet-weight changes, as several other Plaintiffs' experts relied on Fisher's original (erroneous) numeric litter weight conclusions in reaching their own opinions and conclusions.

**The Aftermath of Dr. Engel's Changes.** Plaintiffs' other four new errata result from the significant changes Dr. Engel made in his report as a result of his original reliance on erroneous GLEAMS modeling outputs. (Dkt. No. 1759 at 4-5.) As Engel admits, the "many

small changes in numbers and graphs” necessary to correct his flawed report “propagate[d] through the routing model to change phosphorus loads ...” (Dkt. No. 1766-2 ¶¶ 7, 11.) Just as these changes caused more changes throughout Engel’s own modeling systems, so too did the many changes in Engel’s outputs propagate through many other of Plaintiffs’ experts’ reports. (See Ex. A: Bierman Decl. ¶¶ 9-10.) For example, Engel initially concluded that “litter land application is a substantial contributor (... 59% between 2003 and 2006) to P loads to Lake Tenkiller.” The 59 % figure factored heavily in Engel’s original report to show P impacts to the IRW, and Welch and others expressly rely on that number in their conclusions. (See Ex. L: Welch Dep. at 369:12-24.) Although Defendants’ experts’ preliminary review has not yet confirmed whether Engel’s 59% figure has changed, such a change seems likely given all the other changes. Even a minor change to this figure would result in a chain of alterations to other experts’ opinions. Nevertheless, Engel, like all Plaintiffs’ experts, asserts that his errata “do not change [his] fundamental opinions or conclusions.” (Dkt. No. 1766-2 ¶ 4.)<sup>2</sup>

**Dr. R. Jan Stevenson.** Stevenson is an aquatic ecologist and Plaintiffs’ expert on past, present, and future IRW conditions, including the central issue of phosphorus concentrations. Stevenson’s first errata completely changed his methodology for estimating future TP (total phosphorous) concentrations, which resulted in completely changed numbers in his key Section 5. His second errata (September 30) again changes Section 5, this time to comport with Engel’s

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<sup>2</sup> As explained more fully in the accompanying Declaration of Dr. Bierman (Ex. A ¶¶ 5-9), Defendants’ experts take great issue with Engel’s assertion that his changes do not require a re-evaluation of his entire expert report and that it should only take ten hours to assess his new model (Dkt. No. 1766-2 ¶¶ 15-16). Also, Engel’s assertions that Defendants have had correct GLEAMS modeling outputs since May are simply wrong. (*Id.* ¶¶ 12, 15.) This Court will recall that Defendants only received a full copy of Engel’s working model in August, after a motion to the Court. Moreover, until September, Plaintiffs claimed that all of these modeling outputs were correct when in fact they turned out to be largely flawed. Defendants have been working futilely on this admittedly flawed puzzle the entire time.

errata that fixed critical modeling errors. (Ex. G: Stevenson Second Errata.) Stevenson admits that his errata have “corrected” and “changed the results of [his] analysis,” and concedes that his TP comparison conclusion increased by almost two-fold. (Dkt. No. 1766-4 ¶¶ 5-7; see also Ex. A: Bierman Decl. ¶¶ 15-18.) He nonetheless avers that the errata “did not change [his] opinion, did not provide any new analysis or opinion,” or “any new data.” (Id. ¶ 4.)

**Dr. Scott A. Wells.** Plaintiffs’ water quality and hydrodynamic modeling expert Wells has served two substantial errata of 108 and 122 pages. (Ex. H: Wells Second Errata.) Although Wells’ Declaration highlights a handful of items little changed by his errata (Dkt. No. 1766-3 ¶¶ 5, 9), his changes are in reality widespread and important. (See Ex. A: Bierman Decl. ¶¶ 11-14; Ex. B: Sullivan Decl. ¶¶ 10-12). In spite of Plaintiffs’ representation that no errata “rely upon new data,” Wells admits that his second errata utilizes USGS chlorophyll *a* data for the IRW that he omitted from his original report. (Compare Dkt. No. 1766 at 21, with Dkt. No. 1766-3 ¶ 10.)

Wells’ errata both add data and alter the ratio Wells used in offering chlorophyll *a* as surrogate for algal growth – a critical link in Plaintiffs’ experts’ chain of reasoning. (Id. ¶¶ 7(1), 10.) For instance, the change over 50 years in one historical scenario went from an original 29.4%, to 27.7% in the first errata, to -9.7% in the second errata. Wells admits that his second errata recalibrated his model and concedes that the revisions resulted in “somewhat ... noticeable changes in the modeling results.” (Id. ¶¶ 5, 7-9.) In Table 30, the output for predicted change in TP for one historical scenario went from 713.9% in the original report, to 520.6% in the first errata, and then to 262.6% in the second errata. Wells also admits including a new TP loading scenario in his first errata that he deleted in his second errata. (Id. ¶ 6.) Wells states that “these changes did not alter any of the conclusions or opinions in [his] Report.” (Id. ¶ 9.)

**Dr. Roger Olsen.** Plaintiffs served a second errata for Dr. Olsen, their “fingerprinting”

and sampling expert, on September 30, two weeks after his deposition. (Ex. I: Olsen Second Errata.) Olsen admits that his two errata “correct” “errors in calculations” and “omissions,” some of which were not discussed at his deposition. (*Id.* at 2.) Olsen notes several areas of revision, even in cornerstone aspects of his report such as his spreadsheet regarding USGS highflow data. (Dkt. No. 1766-5 ¶ 11.) As with the other experts who have submitted late substantive reports as “errata,” Defendants have not yet had an opportunity to fully analyze the impact of these new changes. Even though Olsen claims that his “analysis, conclusions and opinions are the same” despite this changed data (*id.* ¶ 13), Defendants’ experts must nevertheless reexamine all of Olsen’s data and conclusions to determine the true nature of the changes and their impact on the conclusions.

**Dr. G. Dennis Cooke.** On September 30, Plaintiffs served a second errata for Dr. Cooke, a limnologist who opines on eutrophication issues. (Ex. J: Cooke Second Errata.) Cooke admits that data was “missing” from his original report. (Dkt. No. 1766-8 ¶¶ 3-4.) Also, although Cooke’s changes are limited in number, they are important in scope and affect Cooke and Welch’s joint opinions about the future trophic states of Lake Tenkiller. Despite this, Dr. Cooke, like all of Plaintiffs’ experts, avers that his corrections and “inclusion of the missing data did not alter [his] conclusions or [his] opinions.” (Dkt. No. 1766-8 ¶ 4.)

**B. Plaintiffs Admit Both to Late Production of Considered Materials and Continued Creation of Considered Materials and New Data to Bolster Opinions**

Plaintiffs now acknowledge that they produced considered materials for Stevenson’s and King’s original reports long after the disclosure deadline. (Dkt. No. 1766 at 12, n.3.) Plaintiffs’ expert Dr. Johnson also admits that he did not provide data with his report that he later used to create a new spreadsheet produced on the eve of his deposition. (Dkt. No. 1759-9.)

Moreover, despite statements that the instant motion does not pertain to “new data” and that their experts are “not bolstering” their opinions, Plaintiffs acknowledge that they have created new considered materials, new analysis, and new data for at least one expert *after* he submitted his original report. Defendants’ Motion explained that Dr. Welch admitted at his deposition to have continued work on his report after its provision with a “goal” of “improve[ing] on the analysis.” (Dkt. No. 1759 at 11.) Dr. Welch now acknowledges that he had more statistical “analysis done because [he] wanted to confirm that statistical analysis in [his] Report” (Dkt. No. 1766-7 ¶ 9) and that he performed even more new post-report analysis “prompted by counsel’s questions during my deposition.” (*Id.*) In short, Welch has admitted to bolstering his opinion twice after submitting his first report, both before and after his deposition.

### **C. This Court Does Not Countenance Late Bolstering of Expert Reports**

Plaintiffs contend that they are bound by Rule 26(e) to serve substantive errata to their expert reports upon discovery of “errors or omissions” and that Defendants are not entitled to relief of any kind. (Dkt. No. 1766 at 1-2, 22-23.) Rather than concede even that Defendants should be allowed extra time for their responsive reports concomitant with the Plaintiffs’ own experts’ delays in providing their final reports, Plaintiffs claim that they should receive attorneys’ fees for having to respond to Defendants’ instant motion. (*Id.* at 22-23.)

Instead of refuting the numerous pertinent Northern District of Oklahoma cases provided in the underlying Motion, Plaintiffs rely primarily on case law from other district courts outside the Tenth Circuit. (*See* Dkt. No. 1766 at 14-15.) The Tenth Circuit does not allow preliminary expert reports. Kern River Gas Transmission Co. v. 6.17 Acres of Land, 156 Fed. Appx. 96, 102 (10th Cir. 2005). When, as here, the Scheduling Order does not provide for follow-up reports, parties may not rely on them. Beller v. United States, 221 F.R.D. 689, 695 (D.N.M. 2003);



Stone v. Deagle, 2006 U.S. Dist LEXIS 90430, at \*13 (D. Colo. Dec. 14, 2006).

As Judges and Magistrate Judges of this Court have noted, litigants may not belatedly bolster expert opinions through supplemental reports. “A supplemental expert report that states additional opinions or rationales or seeks to ‘strengthen’ or ‘deepen’ opinions expressed in the original expert report exceeds the bounds of permissible supplementation and is subject to exclusion under Rule 37(c)(1).” Cohlmia v. Ardent Health Servs., LLC, 2008 U.S. Dist. LEXIS 65292, at \*18-19 (N.D. Okla. Aug. 22, 2008). If a court permits a corrected expert report at all, it must also provide necessary relief to the opposing party through recompense for wasted expert fees, extensions of time to rebut late reports, and the like.

In this Court, Rule 26(e) supplementation of expert reports is allowed only where a disclosing party learns that its information is “incorrect or incomplete and therefore, misleading.” Quarles v. United States, 2006 U.S. Dist. LEXIS 96392, at \*16 (N.D. Okla. Dec. 5, 2006). “The Rule does not permit supplementation to cure failures of omission because the expert did an inadequate or incomplete preparation ....” Id.

The errata here reveal such inadequate and incomplete preparation. Plaintiffs argue that their experts’ many errors and omissions, including the major GLEAMS modeling error by Engel that impacted several other reports, were caused by “the rush to meet the Expert Report deadlines set by the Court.” (Dkt. No. 1759-16.)<sup>3</sup> But this Court has squarely held: “nor does [Rule 26(e)] permit an expert to issue a new or revised report simply because the necessary work was not completed by the expert deadline.” Quarles, 2006 U.S. Dist. LEXIS 96392, at \*16.

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<sup>3</sup> See also Dkt. No. 1766-2 ¶ 8 (Engel states he was “pressed for time to complete my report”); Dkt. No. 1766-3 ¶ 7 (Wells describes his “the rush to meet the Court’s deadline”); Dkt. No. 1766-4 ¶ 2 (attributing the need for changes to “the press of other responsibilities I have as a college professor that coincided with the deadline for submitting my Expert Report”).

In Quarles, this Court struck a late report by Dr. Fisher upon finding that it was not truly “supplemental” under Rule 26(e), “but a clear attempt to bolster Fisher’s opinions in the face of criticism expressed by Defendants’ experts.” Id. at \*14, 16. Here, at least one Plaintiffs’ expert (Welch) admits to trying to improve his report and its underlying analysis after its submission in a direct effort to counter criticism by Defendants’ counsel. (Dkt. No. 1766-7 ¶ 9.)

Further, Plaintiffs do not concede that their original expert reports were wrong, and insist that each expert’s opinions remain unchanged. In Quarles, the Court based its finding that Dr. Fisher’s attempted supplementations were actually impermissible bolstering largely on the fact that counsel had represented that the new “testing data did not change his opinions and were consistent with the opinions and the bases he cited in the [timely first] Report.” 2006 U.S. Dist. LEXIS 96392, at \*15. Hence, the Court found that Fisher’s first report was not “incomplete,” and that the plaintiffs and Fisher were instead trying “to bolster or submit additional expert opinions,” and “cover failures of omission because the expert[s] did an inadequate or incomplete preparation.” Id. at \*16. The Cohlma Court also rejected an attempted “second bite at the apple ... to correct fatal defects” in original expert reports. 2008 U.S. Dist. LEXIS 65292, at \*19.

Under this District’s case law, Plaintiffs’ expert errata are impermissible attempts to bolster their original reports by correcting fatal defects, covering failures of omission, and submitting additional opinions to cure inadequate preparation. If they are allowed to stand, the Court should alleviate the prejudice to Defendants.

#### **D. Substantive Report Authors Not Disclosed as Testifying Experts**

Plaintiffs now represent that they have provided all of the materials requested for Dr. Cox, a named author of Dr. Engel’s expert report. Plaintiffs now also concede to the depositions of Dr. Cox and to reopen the deposition of another (disclosed) report contributor, Todd King.

(Dkt. No. 1766 at 11-12, n.2-3.) This is much of the relief sought by Defendants on this topic.

As illustrated by the deposition transcript attached to the Motion, Welch was unable to adequately testify about the substance of pieces of his own report drafted by undisclosed experts. (See Dkt. No. 1759-12.) Hence, Defendants reiterate their request for like disclosures of Rule 26 and considered materials for all substantive contributing authors – including Jack Johnson and Jim Jones who contributed to Welch’s report – and to allow their depositions if necessary. Contrary to Plaintiffs’ argument, Defendants do not seek disclosures from every lab assistant who had a small hand in Plaintiffs’ expert reports or the analyses underlying them. Defendants only require disclosures of the experts who provided substantive opinions in another’s report.

### CONCLUSION

Defendants have been severely prejudiced by the broad and belated changes and additions to Plaintiffs’ expert reports. Much time, expense, and effort has been wasted, and Plaintiffs have served yet more changes mere days before Defendants’ initial expert deadline. Thus, despite the time left in discovery, Plaintiffs’ late disclosures are not “harmless.” See Stone, 2006 U.S. Dist LEXIS 90430, at \*18-19. The “purpose of this [disclosure] procedure is to permit the opposing party sufficient time to prepare to depose the expert as well as to arrange for expert testimony from other witnesses.” Quarles, 2006 U.S. Dist. LEXIS 96392, at \*11. Plaintiffs have prejudiced Defendants’ expert and trial preparation.

Defendants therefore urge the Court to grant Defendants the relief sought in their motion, including a strike of Plaintiffs’ experts’ errata, a grant to Defendants’ experts of additional time to address any unstricken errata, a bar to any further supplementation or revision without leave of Court, and an award of the expert costs and attorneys’ fees Defendants incurred in addressing the incomplete, erroneous, and altered expert reports and in bringing this Motion.

Respectfully submitted,

RHODES, HIERONYMUS, JONES,  
TUCKER & GABLE, PLLC

BY: s/ John H. Tucker, OBA #9110

JOHN H. TUCKER, OBA #9110  
COLIN H. TUCKER, OBA #16325  
THERESA NOBLE HILL, OBA #19119  
LESLIE J. SOUTHERLAND, OBA #12491  
100 W. Fifth Street, Suite 400 (74103-4287)  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100  
Telephone: 918/582-1173  
Facsimile: 918/592-3390

And

DELMAR R. EHRICH  
BRUCE JONES  
FAEGRE & BENSON LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
Telephone: 612/766-7000  
Facsimile: 612/766-1600  
**ATTORNEYS FOR CARGILL, INC. AND CARGILL  
TURKEY PRODUCTION LLC**

BY: /s/Erin W. Thompson, ABA #2005250  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

ERIN WALKER THOMPSON, Arkansas Bar No.  
2005250

KUTAK ROCK LLP

The Three Sisters Building

214 West Dickson Street

Fayetteville, AR 72701-5221

Telephone: (479) 973-4200

Facsimile: (479) 973-0007

-AND-

STEPHEN L. JANTZEN, OBA # 16247

PATRICK M. RYAN, OBA #7864

PAULA M. BUCHWALD, OBA #20464

RYAN, WIALEY & COLDIRON, P.C.

119 N. Robinson

900 Robinson Renaissance

Oklahoma City, OK 73102

Telephone: (405) 239-6040

Facsimile: (405) 239-6766

E-Mail: sjantzen@ryanwhaley.com

-AND

THOMAS C. GREEN, ESQ.

MARK D. HOPSON, ESQ.

TIMOTHY K. WEBSTER, ESQ.

JAY T. JORGENSEN, ESQ.

GORDON D. TODD, ESQ.

SIDLEY AUSTIN LLP

1501 K Street, N.W.

Washington, D.C. 20005-1401

Telephone: (202) 736-8000

Facsimile: (202) 736-8711

**ATTORNEYS FOR TYSON FOODS, INC.;**

**TYSON POULTRY, INC.; TYSON CHICKEN,**

**INC; AND COBB-VANTRESS, INC.**

BY: /s/ A. Scott McDaniel  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
A. SCOTT MCDANIEL, OBA#16460  
CHRIS A. PAUL, OBA #14416  
NICOLE LONGWELL, OBA #18771  
PHILIP D. HIXON, OBA #19121  
McDaniel, Hixon, Longwell & Acord, PLLC  
320 S. Boston Avenue  
Suite 700  
Tulsa, OK 74103  
-AND-  
SHERRY P. BARTLEY, AR BAR #79009  
MITCHELL WILLIAMS, SELIG,  
GATES & WOODYARD, PLLC  
425 W. Capitol Avenue, Suite 1800  
Little Rock, AR 72201  
**ATTORNEYS FOR PETERSON FARMS, INC.**

BY: /s/ R. Thomas Lay  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
R. THOMAS LAY, OBA #5297  
KERR, IRVINE, RHODES & ABLES  
201 Robert S. Kerr Ave., Suite 600  
Oklahoma City, OK 73102  
-AND-  
JENNIFER S. GRIFFIN  
LATHROP & GAGE, L.C.  
314 East High Street  
Jefferson City, MO 65101  
**ATTORNEYS FOR WILLOW BROOK  
FOODS, INC.**

BY: /s/ Randall E. Rose  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
RANDALL E. ROSE, OBA #7753  
GEORGE W. OWENS, ESQ.  
OWENS LAW F P.C.  
234W. 13 Street  
Tulsa, OK 74119  
-AND-  
JAMES MARTIN GRAVES, ESQ.  
GARY V. WEEKS, ESQ.  
BASSETT LAW FIRM  
POB 3618  
Fayetteville, AR 72702-3618  
**ATTORNEYS FOR GEORGE'S, INC. AND  
GEORGE'S FARMS, INC.**

BY: /s/ John R. Elrod  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
JOHN R. ELROD  
VICKI BRONSON, OBA #20574  
BRUCE WAYNE FREEMAN  
CONNER & WINTERS, L.L.P.  
100 W. Central Street, Suite 200  
Fayetteville, AR 72701  
**ATTORNEYS FOR SIMMONS FOODS, INC.**

BY: /s/ Robert P. Redemann  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
ROBERT P. REDEMANN, OBA #7454  
LAWRENCE W. ZERINGUE, ESQ.  
DAVID C. SENGER, OBA #18830  
PERRINE, MCGIVERN, REDEMANN, REID,  
BARRY &  
TAYLOR, P.L.L.C.  
Post Office Box 1710  
Tulsa, OK 74101-1710  
-AND-

ROBERT E. SANDERS  
STEPHEN WILLIAMS  
YOUNG, WILLIAMS, HENDERSON &  
FUSILIER  
Post Office Box 23059  
Jackson, MS 39225-3059  
**ATTORNEYS FOR CAL-MAINE FARMS,  
INC. AND CAL-MAINE FOODS, INC.**

### **CERTIFICATE OF SERVICE**

I certify that on the 6th day of October, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	<a href="mailto:drew_edmondson@oag.state.ok.us">drew_edmondson@oag.state.ok.us</a>
Kelly Hunter Burch, Assistant Attorney General	<a href="mailto:kelly_burch@oag.state.ok.us">kelly_burch@oag.state.ok.us</a>
J. Trevor Hammons, Assistant Attorney General	<a href="mailto:trevor_hammons@oag.state.ok.us">trevor_hammons@oag.state.ok.us</a>
Robert D. Singletary	<a href="mailto:Robert_singletary@oag.state.ok.us">Robert_singletary@oag.state.ok.us</a>
Daniel Lennington, Assistant Attorney General	<a href="mailto:Daniel.lennington@oag.ok.gov">Daniel.lennington@oag.ok.gov</a>

Melvin David Riggs	<a href="mailto:driggs@riggsabney.com">driggs@riggsabney.com</a>
Richard T. Garren	<a href="mailto:rgarren@riggsabney.com">rgarren@riggsabney.com</a>
Sharon K. Weaver	<a href="mailto:sweaver@riggsabney.com">sweaver@riggsabney.com</a>
David P. Page	<a href="mailto:dpage@riggsabney.com">dpage@riggsabney.com</a>
Riggs Abney Neal Turpen Orbison & Lewis	

Robert Allen Nance	<a href="mailto:rnance@riggsabney.com">rnance@riggsabney.com</a>
Dorothy Sharon Gentry	<a href="mailto:sgentry@riggsabney.com">sgentry@riggsabney.com</a>
Riggs Abney	

Louis W. Bullock	<a href="mailto:lbullock@mkblaw.net">lbullock@mkblaw.net</a>
Robert M. Blakemore	<a href="mailto:rblakemore@mkblaw.net">rblakemore@mkblaw.net</a>
Miller Keffer & Bullock	

William H. Narwold	<a href="mailto:bnarwold@motleyrice.com">bnarwold@motleyrice.com</a>
Elizabeth C. Ward	<a href="mailto:lward@motleyrice.com">lward@motleyrice.com</a>
Frederick C. Baker	<a href="mailto:fbaker@motleyrice.com">fbaker@motleyrice.com</a>
Lee M. Heath	<a href="mailto:lheath@motleyrice.com">lheath@motleyrice.com</a>
Elizabeth Claire Xidis	<a href="mailto:cxidis@motleyrice.com">cxidis@motleyrice.com</a>
Motley Rice	

#### **COUNSEL FOR PLAINTIFFS**

Stephen L. Jantzen	<a href="mailto:sjantzen@ryanwhaley.com">sjantzen@ryanwhaley.com</a>
Paula M. Buchwald	<a href="mailto:pbuchwald@ryanwhaley.com">pbuchwald@ryanwhaley.com</a>
Ryan, Whaley & Coldiron, P.C.	



Mark D. Hopson  
Jay Thomas Jorgensen  
Timothy K. Webster  
Gordon D. Todd  
Sidley Austin LLP

[mhopson@sidley.com](mailto:mhopson@sidley.com)  
[jjorgensen@sidley.com](mailto:jjorgensen@sidley.com)  
[twebster@sidley.com](mailto:twebster@sidley.com)  
[gtodd@sidley.com](mailto:gtodd@sidley.com)

Michael R. Bond  
Erin W. Thompson  
LLP

[michael.bond@kutakrock.com](mailto:michael.bond@kutakrock.com)  
[erin.thompson@kutakrock.com](mailto:erin.thompson@kutakrock.com) Kutack Rock

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.;  
AND COBB-VANTRESS, INC.**

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables

[rtl@kiralaw.com](mailto:rtl@kiralaw.com)

Jennifer S. Griffin  
Lathrop & Gage, L.C.  
**COUNSEL FOR WILLOW BROOK FOODS, INC.**

[jgriffin@lathropgage.com](mailto:jgriffin@lathropgage.com)

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger  
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

[rredemann@pmrlaw.net](mailto:rredemann@pmrlaw.net)  
[lzeringue@pmrlaw.net](mailto:lzeringue@pmrlaw.net)  
[dsenger@pmrlaw.net](mailto:dsenger@pmrlaw.net)

Robert E. Sanders  
E. Stephen Williams  
Young Williams P.A.  
**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

[rsanders@youngwilliams.com](mailto:rsanders@youngwilliams.com)  
[steve.williams@youngwilliams.com](mailto:steve.williams@youngwilliams.com)

George W. Owens  
Randall E. Rose  
The Owens Law Firm, P.C.

[gwo@owenslawfirmnpc.com](mailto:gwo@owenslawfirmnpc.com)  
[rer@owenslawfirmnpc.com](mailto:rer@owenslawfirmnpc.com)

James M. Graves  
Gary V. Weeks  
Paul E. Thompson, Jr.  
Woody Bassett  
K.C. Dupps Tucker

[jgraves@bassettlawfirm.com](mailto:jgraves@bassettlawfirm.com)

Bassett Law Firm  
**COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.**

John R. Elrod  
Vicki Bronson  
Bruce W. Freeman  
Conner & Winters, LLLP  
**COUNSEL FOR SIMMONS FOODS, INC.**

[jelrod@cwlaw.com](mailto:jelrod@cwlaw.com)  
[vbronson@cwlaw.com](mailto:vbronson@cwlaw.com)  
[bfreeman@cwlaw.com](mailto:bfreeman@cwlaw.com)

A. Scott McDaniel  
Nicole M. Longwell  
Philip D. Hixon

[smcdaniel@mhla-law.com](mailto:smcdaniel@mhla-law.com)  
[nlongwell@mhla-law.com](mailto:nlongwell@mhla-law.com)  
[phixon@mhla-law.com](mailto:phixon@mhla-law.com)

Craig Mirkes [cmirkes@mhla-law.com](mailto:cmirkes@mhla-law.com)  
McDaniel, Hixon, Longwell & Acord, PLLC  
Sherry P. Bartley [sbartley@mws gw.com](mailto:sbartley@mws gw.com)  
Mitchell Williams Selig Gates & Woodyard  
**COUNSEL FOR PETERSON FARMS, INC.**

Michael D. Graves [mgraves@hallestill.com](mailto:mgraves@hallestill.com)  
Dale Kenyon Williams, Jr. [kwilliams@hallestill.com](mailto:kwilliams@hallestill.com)  
**COUNSEL FOR CERTAIN POULTRY GROWERS**

Mia Vahlberg [mwahlberg@gablelaw.com](mailto:mwahlberg@gablelaw.com)  
**COUNSEL FOR NATIONAL CHICKEN COUNCIL,  
U.S. POULTRY & EGG ASSOCIATION AND NATIONAL  
TURKEY FEDERATION**

Adam J. Siegel [ajsiegel@hhlaw.com](mailto:ajsiegel@hhlaw.com)  
James T. Banks [jtbanks@hhlaw.com](mailto:jtbanks@hhlaw.com)

John D. Russell [jrussell@fellerssnider.com](mailto:jrussell@fellerssnider.com)  
**ATTORNEYS FOR ARKANSAS FARM BUREAU FEDERATION**

Barry G. Reynolds [Reynolds@titushillis.com](mailto:Reynolds@titushillis.com)  
**ATTORNEYS FOR AMERICAN FARM BUREAU FEDERATION  
AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION**

Jessica E. Rainey [jrainey@titushillis.com](mailto:jrainey@titushillis.com)  
**ATTORNEYS FOR AMERICAN FARM BUREAU FEDERATION  
AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION**

M. Richard Mullins [Richard.mullins@mcafeetaft.com](mailto:Richard.mullins@mcafeetaft.com)  
**ATTORNEYS FOR TEXAS FARM BUREAU,  
TEXAS CATTLE FEEDERS ASSOCIATION,  
TEXAS PORK PRODUCERS ASSOCIATION, AND  
TEXAS ASSOCIATION OF DAIRYMEN**

William A. Waddell, Jr. [waddell@fec.net](mailto:waddell@fec.net)

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert  
Secretary of the Environment  
State of Oklahoma  
3800 North Classen  
Oklahoma City, OK 73118  
**COUNSEL FOR PLAINTIFFS**

Charles L. Moulton  
Arkansas Natural Resources Commission  
323 Center Street  
Suite 200  
Little Rock, AR 72206

s/ John H. Tucker